

STATE OF MICHIGAN
COURT OF APPEALS

BLAISE A. REPASKY,

Plaintiff-Appellee,

v

VALERIE J. REPASKY,

Defendant-Appellant.

UNPUBLISHED

September 12, 2000

No. 212859

Wayne Circuit Court

LC No. 97-715243-DM

Before: Griffin, P.J., and Holbrook, Jr., and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's rulings with regard to the division of property, the award of alimony and attorney fees, and two evidentiary rulings. We affirm.

At trial, each party claimed entitlement to sixty percent of the marital estate and claimed that the other party was entitled to only forty percent. Defendant sought to "impeach" plaintiff's claim of entitlement to sixty percent with evidence of a proposed settlement offer in which he offered defendant fifty percent of the marital estate. We review the trial court's ruling regarding the admission of evidence for an abuse of discretion. *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). Because the proposed property settlement was offered to show that plaintiff's claim to sixty percent of the estate was invalid or that defendant had a valid claim to at least fifty percent of the estate, it was inadmissible under MRE 408. *Kerkhof v Kerkhof*, 703 NE2d 1108, 1112 (Ind App, 1998). Therefore, the trial court did not abuse its discretion in excluding the evidence.

We further find the trial court did not abuse its discretion in admitting evidence regarding defendant's affair. Although the parties stopped engaging in sexual relations up to three years before they separated, the marital relationship did not end until there was "some external public manifestation of intent by the parties, such as moving out or filing a complaint for divorce." *Wilson v Wilson*, 179 Mich App 519, 523-524; 446 NW2d 496 (1989). Because defendant began her relationship with the other man before plaintiff filed for divorce and before defendant vacated the marital home, the evidence was

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

properly admissible on the issue of fault. Compare *Knowles v Knowles*, 185 Mich App 497, 500-501; 462 NW2d 777 (1990) (evidence of husband's affair irrelevant because it occurred after the wife had filed for divorce and after the breakdown of the marital relationship).

Defendant next contends the trial court's division of property was inequitable. The applicable standard of review is set forth in *Draggou v Draggou*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997), as follows:

In a divorce case, this Court must first review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard. . . . A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. . . . If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. [Citations omitted.]

The court may distribute all property that has "come to either party by reason of the marriage. . ." MCL 552.19; MSA 25.99. Once the court determines which assets are part of the marital estate, it must determine their values. "For purposes of dividing property, marital assets are typically valued at the time of trial or at the time judgment is entered, . . . though the court may, in its discretion, use a different date." *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997). Once the court determines the assets of the marital estate and the valuation of those assets, it must apportion those assets between the parties. "The goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances. . . . Each spouse need not receive a mathematically equal share, but significant departures from congruence must be explained clearly by the court." *Id.* at 114-115 (citation omitted). Among the factors to be considered are the source of the property; the parties' contributions toward its acquisition and to the general marital estate; the duration of the marriage; the parties' needs and circumstances; the parties' ages, health, life status, and earning abilities; the cause of the divorce as well as past relations and conduct between the parties; interruption of the career or education of either party; and general principles of equity. *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992); *Hanaway v Hanaway*, 208 Mich App 278, 292-293; 527 NW2d 792 (1995). The determination of relevant factors will vary depending on the facts and circumstances of the case. *Sparks, supra* at 160.

Contrary to defendant's contention, the trial court made specific findings of fact regarding the relevant factors and those findings, which comport with the evidence, are not clearly erroneous. The trial court was not required to reject all of plaintiff's testimony as incredible simply because it did not believe his claim that defendant absconded with a substantial amount of money. *People v Bowyer*, 108 Mich App 517, 522; 310 NW2d 445 (1981); *Detroit Edison Co v Zoner*, 12 Mich App 612, 618; 163 NW2d 496 (1968). Although defendant did not get sixty percent of the marital assets as requested, we are not convinced that the property settlement devised by the court was inequitable.

Defendant next claims the trial court erred in awarding her alimony in the amount of \$1,200 a month for 7-1/2 years instead of \$2,500 a month for ten years, as she requested. As with the division of property, this Court reviews the trial court's findings of fact for clear error. If this Court upholds the factual findings, it must decide whether the dispositional ruling was fair and equitable in light of those facts. This Court will not reverse the trial court's dispositional ruling absent a firm conviction that it was inequitable. *Sparks, supra* at 151-152; *Magee v Magee*, 218 Mich App 158, 161-162; 553 NW2d 363 (1996).

An award of alimony is within the trial court's discretion. *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992). "A court may award alimony in a divorce action 'as it considers just and reasonable,' after considering the ability of either party to pay, the character and situation of the parties, and all other circumstances of the case." *Id.*

Factors to be considered are (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. In addition, the court may consider a party's fault in causing the divorce. [*Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991) (citation omitted).]

The main objective of alimony is to balance the incomes and needs of the parties in a way that would not impoverish either party. *Hanaway, supra* at 295. The trial court should make specific findings of fact regarding the factors relevant to the case. *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993).

The trial court recognized and made extensive findings on each of the relevant factors. Defendant does not specifically challenge those findings, which comport with the evidence and are not clearly erroneous. Defendant argues that, to maintain her prior standard of living, she requires \$5,700 a month and the \$1,200 alimony is simply insufficient, especially because she doesn't want to work while attending school. Considering the parties lived beyond their means during the marriage, defendant attended school part-time and offered no reason why she could not work part-time to supplement her income, and taking into consideration plaintiff's ability to pay, we are not convinced the alimony award was inequitable.

Defendant lastly challenges the trial court's award of attorney fees in the amount of \$9,875. We review the trial court's decision to award attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999).

Attorney fees in a divorce action are not recoverable as of right. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). An award of reasonable attorney fees is authorized when one party is unable to bear the expense of the litigation and needs assistance to prosecute or defend the complaint

for divorce and the other party has the ability to pay. *Kosch, supra*; *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). A party may require assistance in paying attorney fees despite receiving substantial assets if the value of those assets is uncollectible or not subject to ready liquidation. *Kurz, supra* at 298. Attorney fees may also be awarded when the party requesting them has been forced to incur the fees as a result of the other party's unreasonable conduct in the course of the litigation. *Hanaway, supra* at 298. "A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id.*

Taking into account the substantial liquid assets defendant received, the absence of evidence that she was unable to bear the expense of litigation without assistance, and the other facts and circumstances of the case, we cannot find that the court's award constituted an abuse of discretion.

Affirmed.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.